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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 300

JAMES TOOAHIMPAH TATE, et al.,
Petitioners

v.

WALTER J. HICKEL, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the

Western District of Oklahoma (App. 27-37)* is reported at 277 F. Supp. 464 (1967).

The opinion of the Court of Appeals for the Tenth Circuit vacating the judgment of the Trial Court with directions to dismiss the action for want of jurisdiction is reported at 407 F.2d 394 (1969) App. 44-47).

JURISDICTION

The judgment of the Court of Appeals was entered March 3, 1969, (App. 48-49) and on April 8, 1969, Petition of Appellees for Rehearing was denied. (App. 62).

Petition for Certiorari was filed June 28, 1969, and was granted October 13, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED FOR REVIEW

The question herein presented is:

Is a decision of the Secretary of the Interior approving or disapproving the Will of an Indian made pursuant to 25 U.S.C. § 373 subject to judicial review under the authority of 5 U.S.C. § 702 and 28 U.S.C. § 1361.

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* A joint appendix containing the pleadings and orders of the Court has been prepared in accordance with Rule 36 for use in No. 300 and references to that appendix will be cited as App. - - -. Included as a part of this brief as appendix material are pertinent Code of Federal Regulations, Memorandum to the Secretary of the Interior and other miscellaneous documents. These will be cited, for example, as App. A at - - - or App. B at - - - etc.

STATUTES INVOLVED

Title 5 U.S.C. § 702:

Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 28 U.S.C. § 1361:

Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 25 U.S.C. § 372:

Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: * * *"

Title 25 U.S.C. § 373:

Disposal by will of allotments held under trust

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: * * *".

Explanatory Note: Emphasis in this brief will be by underscoring in lieu of italics.

Title 25 Code of Federal Regulations:

Portions of Part 15 relative to execution and approval of Wills of Indians (App. A 1-4).

STATEMENT OF THE CASE

This case originated by the filing of a Complaint (App. 5-10) by the Petitioners or their predecessors, which Complaint was filed in the United States District Court for the Western District of Oklahoma and was against Stewart L. Udall, the predecessor of the Respondent herein, Walter J. Hickel, Secretary of the Interior for the United States. Dorita High Horse was allowed to file a Plea in Intervention. (App. 11).

The Complaint of the Petitioners requested the Court to review, reverse, and set aside the decision and Order of Stewart L. Udall, Secretary of the Interior, entered on the 20th day of June, 1967, by the Secretary of the Interior, (App. 82-87) which Order by the Secretary of the Interior disapproved the Will of George Chahsenah dated March 14, 1963, and which Order stated that the Secretary of the Interior did not give his approval to the said Will and the approval of the said Will heretofore given by the Examiner of Inheritance was to be rescinded. The Petitioners further prayed in their Complaint that the Secretary of the Interior be directed to approve the probate of the Will of George Chahsenah dated March 14, 1963, (Emphasis Added) and to Decree distribution of his estate according to the terms of said Will, and that the Petitioners have all other relief proper in law and equity.

The Order of the Secretary of the Interior entered on June 20, 1967, arose in the following manner.

On March 14, 1963, George Chahsenah made a Will (App. 64-69) bequeathing and devising his estate to a niece and three (3) of her children, which niece and children were the original Petitioners in the Complaint filed in the United States District Court. George Chahsenah, a Comanche Indian, died on the 11th day of October, 1963, at the age of approximately 55 years and his death occurred approximately six (6) months after the execution of his Will dated March 14, 1963.

The factum of the Will was diligently contested before the Examiner of Inheritance by certain disinherited nieces and nephews and by Dorita High Horse, who was found by the Examiner of Inheritance to be the natural or illegitimate daughter of George Chahsenah.

The primary grounds of contest by the contestants were that George Chahsenah had not been sober enough for several years to make a Will prior to his death and that he had previously made many Wills and the contestants designated him as a "Will Maker."

The Examiner of Inheritance found that under the circumstances, the Will was not unnatural because the niece he named in his Will had been raised by the mother of the decedent in the same home as the decedent. The Examiner of Inheritance further found that the decedent was sober when his last Will was executed and the factum of the Will by the decedent met all technical requirements. He further found

that George Chahsenah was the natural father of Dorita High Horse and she was his sole heir at law. Based on the findings aforestated, the Examiner of Inheritance approved the Will of George Chahsenah and directed the distribution of his estate in accordance with said Will.

A Petition for Rehearing by the contestants was denied on November 16, 1966, by the Examiner of Inheritance. (App. 79-81).

Dorita High Horse and certain disinherited nieces and nephews of the decedent, George Chahsenah, perfected an appeal to the Secretary of the Interior from the decision of the Examiner of Inheritance. On appeal, pursuant to delegated authority, the Regional Solicitor for the Tulsa Region of the Office of the Solicitor for the Department of the Interior, issued an Order on June 20, 1967, (App. 82-87) disapproving the Will of the decedent, George Chahsenah, which Order by the Regional Solicitor was the final administrative decision of the Secretary of the Interior relative to the approval or disapproval of the said Will. The said Order issued on June 20, 1967, stated that the Secretary of the Interior was withholding his approval of the Will dated March 14, 1963, because the decedent, George Chahsenah, had made no effort during his lifetime to support his natural (illegitimate) daughter and therefore, there had not been a just and equitable treatment of Dorita High Horse, the natural daughter of George Chahsenah, the decedent, by George Chahsenah. The Regional Solicitor, speaking for the Secretary of the Interior, stated that by the exercise of his discretionary responsibility, the Secretary of the Interior could disapprove the Will of the decedent because it did not achieve

a just and equitable treatment of his heir at law, which disapproval of said Will was in fact consumated by the Secretary of the Interior giving as his reasons for said disapproval the equitable reasons as aforestated. The Secretary of the Interior acting by and through the Regional Solicitor, agreed with the Examiner of Inheritance that the Will of George Chahsenah dated March 14, 1963, met all of the technical requirements for a valid Will and the factum of the Will was proper, but due to the failure of the Will to achieve a just and equitable treatment of the decedents heir at law, the Will was not and would not be approved by the Secretary of the Interior.

The Intervener, Dorita High Horse, filed her Answer to the Complaint of the Plaintiffs on September 27, 1967, (App. 12-16) and the Intervener also on the same date filed her Motion for Summary Judgment (App.17-18). The Intervener, in her Answer, denied that the United States District Court had jurisdiction of the action under the Administrative Procedure Act and further denied that the Secretary of the Interior acted in an arbitrary, capricious and unreasonable manner in disapproving the Will of George Chahsenah and her Motion for Summary Judgment was based on the same allegations and premises contained in her Answer.

The Secretary of the Interior filed his Answer as the Defendant to the Complaint of the Plaintiffs on October 20th, 1967, (App. 19-22) and the Secretary of the Interior on the 31st day of October, 1967, filed his Motion for Summary Judgment (App. 23-24). The Secretary of the Interior in his Answer admitted that the United States District

Court had jurisdiction to review the decision of the Secretary of the Interior pursuant to the Administrative Procedure Act. (Emphasis Added). The Secretary of the Interior further denied in his Answer that he acted in an arbitrary, capricious and an unreasonable manner and further denied that there was any abuse of discretion by the action of the Secretary in disapproving the Will of George Chahsenah. The Secretary of the Interior in his Motion for Summary Judgment completely reversed the position that he had taken in his Answer relative to jurisdiction. In his Motion for Summary Judgment, the Secretary stated that the United States District Court was without jurisdiction to set aside the decision of the Secretary of the Interior for the reason that the decision of the Secretary of the Interior was made within the scope of his authority and was final and conclusive. The Motion further stated that the action of the Secretary of the Interior was not arbitrary or capricious and was not an abuse of his discretion.

The Plaintiffs filed their Motion for Summary Judgment on November 20, 1967, (App. 25-26) directing the Secretary of the Interior to approve the Will of George Chahsenah dated March 14, 1963, and to distribute his estate in accordance with the terms of said Will. The Plaintiffs in their Motion stated that the Secretary of the Interior acted in an arbitrary, capricious, and unreasonable manner and that there was an abuse of his discretion in his refusal to approve the Will of George Chahsenah. The Plaintiffs also stated in their Motion that the Secretary of the Interior made a decision based on an erroneous legal foundation and that he acted in excess of his statutory jurisdiction by disapproving the

Will of George Chahsenah for equitable reasons and the action of the Secretary in disapproving the Will of George Chahsenah was a misconception of his power and authority relative to the disapproval or approval of Wills of Indian testators whereby he attempted to substitute his will for that of the Indian testator. (Emphasis Added).

Judge Eubanks rendered his Memorandum Opinion (App. 27-37) dated December 18, 1967, after considering the Complaint, Motions for Summary Judgment, Briefs and the Administrative record which included evidence produced at the several administrative hearings before the Examiner of Inheritance, which administrative record was attached as an Exhibit to the Motion of the Secretary of the Interior for a Summary Judgment, which Administrative record has been omitted from the Appendix herein by stipulation and agreement, except portions of same which by agreement are contained in the Appendix. Judge Eubanks in his Memorandum Opinion found that the decedents Will was not an unnatural Will and he further found that it had been previously wrongfully determined that the Secretary of the Interior could use his approval powers to substitute his Will for that of the decedent testator. Judge Eubanks further found that if the Statute giving an Indian testator the right to make a Will is to be meaningful, the Indian testator must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. Judge Eubanks also found that the denial of the approval of the last Will and Testament of George Chahsenah by the Secretary of the Interior lacked rational basis and was an unreasonable and arbitrary denial of the right conferred upon an Indian by Congress

to make his last Will and Testament. The Motion of the Plaintiffs for Summary Judgment was granted and Judge Eubanks directed the preparing of a formal Judgment in accordance with his Opinion.

A formal Judgment was rendered by District Judge Eubanks (App. 38-39) on December 28, 1967, ordering and directing that the last Will and Testament dated March 14, 1963, of George Chahsenah, a deceased Comanche Unallottee Indian, be approved by the Secretary of the Interior, and Judge Eubanks further ordered that the Estate of the said Indian be distributed in accordance with the terms of the last Will of the said decedent and the said formal Judgment further found that the Court had determined that it had jurisdiction of the cause of action in question.

An appeal from the Judgment of the Trial Court was taken to the Circuit Court of Appeals for the Tenth Circuit by Stewart L. Udall, Secretary of the Interior (App. 42) dated February 20, 1968, and by Dorita High Horse, Intervener (App. 43) dated February 26, 1968.

The Court of Appeals for the Tenth Circuit rendered its Opinion and decision (App. 44-47) dated March 3, 1969. The Court of Appeals held in its Opinion that the basic facts were without dispute as briefly summarized in its Opinion. The Court of Appeals further found that the Trial Court did not have jurisdiction to review the Orders of the Secretary of the Interior concerning either intestate succession of deceased Indians or the approval or disapproval of Wills of Indian testators giving as its authority two recent decisions of the Tenth Circuit: Heffelman vs. Udall 378 F. 2d 109 (1967) and Attocknie vs. Udall

390 F. 2d 636 (1968) Cert. den. October 14, 1968, 393 U.S. 833, 89 S. Ct. 104, 21 L. Ed 2d 104, and the Court of Appeals directed that the action and Complaint be dismissed for want of jurisdiction.

An examination of Heffelman vs. Udall Supra and Attocknie vs. Udall Supra will reveal that the United States Court of Appeals for the Tenth Circuit has held that 25 U.S.C. 373 complements 25 U.S.C. 372 and where 25 U.S.C. 372 has a proviso that states that the decision of the Secretary of the Interior determining the heirship of a deceased Indian who died intestate shall be final and conclusive and is therefore not subject to Judicial review under the Administrative Procedure Act or other applicable Statutes and that the same reasoning applies to 25 U.S.C. 373 relative to the approval or disapproval by the Secretary of the Interior of Wills of Indian testators even though the final and conclusive clause or proviso does not appear in 25 U.S.C. 373.

Formal Judgments were rendered by the Circuit Court of Appeals in the companion cases of Dorita High Horse, Appellant vs. the Appellees, and Stewart L. Udall, the Appellant, vs. the Appellees, on March 3, 1969, (App. 48-49) which formal Judgments directed that the Judgment in the Trial Court be vacated and the action be dismissed for want of jurisdiction.

The Appellees (Plaintiffs herein) filed their Petition for Rehearing before the Circuit Court of Appeals for the Tenth Circuit (App. 50-61) on March 24, 1969, which Petition was denied by the Court of Appeals (App. 62) on April 8, 1969.

SUMMARY FOR ARGUMENT

The Secretary of the Interior on appeal from a hearing held by the Examiner of Inheritance refused to approve the Will of George Chahsenah, a Comanche Indian, who had devised and bequeathed his trust property to a niece and three of her children. The action of the Secretary of the Interior reversed the Examiner of Inheritance for the Department of the Interior who had ruled that the factum of the Will was satisfactory and that same should be upheld and approved by the Secretary of the Interior. The decision of the Secretary of the Interior was the final administrative decision and the Secretary of the Interior stated that the decedent Indian did not by his Will achieve and consumate an equitable treatment of his natural (illegitimate) daughter, one Dorita High Horse. The Secretary of the Interior further stated that by the exercise of his discretionary responsibility, he could disapprove the Will of the Indian testator even though the factum of the Will was satisfactory, which he did in fact do by refusing to approve the Will. The disapproval or non-approval of the Will of the Indian testator resulted in the estate of the decedent Indian becoming vested solely in Dorita High Horse, his natural (illegitimate) daughter, which also further resulted in the niece of the decedent Indian and her children, who were the devisees and legatees in the Will of the decedent Indian, being eliminated as devisees and legatees of the decedent Indian and thereby receiving no part or portion of his estate.

The Secretary of the Interior was not authorized to withhold the approval of the Will of the decedent Indian for equitable reasons and his action was a misconception of his power and authority relative to the approval

or disapproval of Wills of Indian testators and he attempted to substitute his Will for that of the Indian testator. The attempt herein by the Secretary of the Interior to disapprove Wills of Indian testators for equitable reasons was a complete reversal of the interpretation that has formerly been given to the Statutes and Regulations governing the execution of Wills by Indians devising, bequeathing, and willing their trust properties. In numerous prior decisions by the Secretary of the Interior, the Secretary has approved Wills that did not achieve or consumate an equitable treatment of the heirs at law of the decedent Indian and the Estate of Wook-Kah-Nah 65 ID 436 confirms this premise. The administrative decision of the Secretary of the Interior approving the Will of Wook-Kah-Nah was ratified and confirmed by the Circuit Court of Appeals for the District of Columbia in Asenap v. Huff, 312 F.2d 358 (1962). Wook-Kah-Nah was an aged, illiterate, full-blood Comanche Indian woman at the time she made her Will. By her Will she gave lands having very valuable oil runs from same to two of her children and she gave other properties of nominal value to her four other children and two grandchildren. The Secretary of the Interior approved the Will of Wook-Kah-Nah even though her Will was diligently contested and the equity theory was never advanced by the Secretary of the Interior as a reason for him to disapprove her Will. On Judicial review, Asenap vs. Huff supra, the Court of Appeals for the District of Columbia confirmed the decision of the Secretary of the Interior with the result that the Will of Wook-Kah-Nah remained as an approved Will and the Estate of Wook-Kah-Nah was distributed very unequitable or uneven in so far as her heirs at law were concerned.

The Indian Law Book in the 1958 Revision by the Secretary of the Interior also states that the Wills of Indian testators are to be their own Wills and that the Secretary of the Interior cannot change the terms of the Wills of Indian testators and the Indian Law Book cites as authority a Memorandum addressed to the Assistant Secretary of the Interior dated May 10, 1941. The Solicitor for the Secretary of the Interior acting by and through the Chief of the Indian Division was the author and composer of said Memorandum. The Solicitor said "Whatever discretion the Secretary may have in the matter of approving or disapproving the Will, it is clear that this discretion should not be exercised to the extent of substituting his Will for that of the testator." The Secretary of the Interior in this case decided that the Indian testator did not make a proper Will and the Will was not equitable and by refusing to approve the Will of the Indian testator, the Secretary of the Interior actually substituted his Will for the Will of the Indian testator. This action by the Secretary of the Interior was based on an erroneous legal foundation and was an arbitrary and capricious act and his actions lacked a rational basis and was an unreasonable and arbitrary denial of the right of the Indian testator to make his Will as conferred upon him by Congress.

A Complaint was filed in the United States District Court by the legatees and devisees of the Indian testator for Judicial review of the action of the Secretary of the Interior in not approving the Will of the Indian testator giving as his reason for non-approval of said Will the reason that the Will

did not achieve an equitable treatment of the heir at law of the decedent, namely, Dorita High Horse, his natural or illegitimate daughter. Dorita High Horse was allowed to intervene and after the issues were joined, the United States District Court held that it had jurisdiction under the Administrative Procedure Act to review the action of the Secretary of the Interior and also jurisdiction under 28 U.S.C. 1361, which Statute gave the United States District Court original jurisdiction in any action in the nature of a mandamus to compel an officer or employee of the United States to perform a duty owed to the Plaintiffs. The Trial Court directed the Secretary of the Interior to approve the Will of the Indian testator and distribute his estate in accordance with his said Will because the factum of the Will was found to be satisfactory and it thereby became the duty of the Secretary of the Interior to approve the Will where the factum of the Will was satisfactory and the Trial Court disapproved the equity theory as advanced by the Secretary of the Interior as a reason for the non-approval of Wills of Indian testators.

The Secretary of the Interior and Dorita High Horse appealed to the Circuit Court of Appeals for the Tenth Circuit and the Court of Appeals in its decision rendered on appeal High Horse vs. Tate 407 F.2d 394 (1969) held that the Trial Court did not have jurisdiction under the Administrative Procedure Act to give Judicial review to the action of the Secretary of the Interior in approving or disapproving the Will of a decedent Indian giving as its authority for this holding the decision in two recent cases cited by the

Court of Appeals for the Tenth Circuit, namely, Heffelman vs. Udall 378 F.2d 109 (10th Cir. 1967) and Attocknie vs. Udall 390 F.2d 636 (10th Cir. 1968). The Heffelman case supra and the Attocknie case supra held that Judicial review of the action of the Secretary of the Interior in approving or disapproving Wills of Indian testators was not subject to Judicial review because Section 25 U.S.C. 372 and Section 25 U.S.C. 373 complement each other and 25 U.S.C. 372 has a statement or clause in same that the decision of the Secretary of the Interior in determining the heirs of a deceased Indian shall be final and conclusive and therefore the final and conclusive clause applied to the action of the Secretary of the Interior in approving or not approving the Will of a decedent Indian under 25 U.S.C. 373 even though 25 U.S.C. 373 does not contain the final and conclusive clause within the provision of the said Statute.

The Court of Appeals for the Tenth Circuit failed to take cognizance of the fact that the Trial Court had taken jurisdiction herein under both the Administrative Procedure Act and also in mandamus pursuant to 28 U.S.C. 1361. The decision of the Court of Appeals, High Horse vs. Tate supra, is cast solely upon the theory that the Trial Court did not have jurisdiction of the action for the reason that the final and conclusive clause prohibits and bars the action under the Administrative Procedure Act because the Administrative Procedure Act does not permit Judicial review to an administrative decision where the Statute states that the administrative decision shall be final or final and conclusive. It is the contention of the legatees and devisees of the Indian testator that 25 U.S.C. 372 does not complement 25 U.S.C. 373 and therefore the final and conclusive clause does not apply to

25 U.S.C. 373. The Trial Court, therefore, had jurisdiction under the Administrative Procedure Act to give Judicial review to the decision of the Secretary of the Interior when he acted in an arbitrary and capricious manner and made a decision based on an erroneous legal foundation by his refusal to approve the Will of the Indian testator for equitable reasons. The primary authority for this contention is Homovich vs. Chapman 191 F.2d 761 (D.C. Cir. 1951) and the same theory was also cogently developed in the dissenting Opinion of Circuit Judge Burger in Hayes vs. Seaton 270 F.2d 319 (1959) Cert. den. 364 U.S. 814, Rehearing for Cer. den. 364 U.S. 906.

This Court has, on several different occasions held that the Statutes stating that the administrative action is final or final and conclusive does not necessarily prohibit Judicial review of same and this Court has given and granted Judicial review in different instances and particularly in the immigration cases and in the draft board cases. A draft board case exemplifying this reasoning is Estep vs. United States 327 U.S. 114, 66 S.C. 423, 90 L. Ed. 567 (1946).

The Trial Court had authority and jurisdiction to order the approval of the Will of the Indian testator by the Secretary of the Interior in the nature of a mandamus. Jurisdiction and venue for actions in the nature of mandamus are now vested in all of the United States District Courts pursuant to 28 U.S.C. 1361 and 28 U.S.C. 1391, Ashe vs. McNamara 355 F.2d 277 (1st Cir. 1965).

When the Secretary of the Interior acts without a legal foundation for his action, he is subject to mandamus and this

Court has so held in Lane vs. Hoglund 244 U.S. 174 (1917), 61 L. Ed. 1066, 37 S.C. 558.

The legatees and devisees of the Indian testator herein further state that the decedent Indian was given the right to make his Will of trust property by Congress and it was never the intent and purpose of Congress to give the Secretary of the Interior the arbitrary authority to disapprove the Will of an Indian for equitable reasons if the factum of the Will was proper and complied with the Statutes and Regulations.

This Court may, after considering the temporal depth of the existing legislation, make a determination that Judicial review can be given to the adjudication of heirs of Indians dying intestate and the approval or disapproval of their Wills by the Secretary of the Interior under both 25 U.S.C. 372 and 25 U.S.C. 373 even though the final and conclusive clause appears in 25 U.S.C. 372, which would be a change from the former decisions of this Court that Judicial review can not be given to the determination of heirs of an Indian dying intestate by the Secretary of the Interior. This Court will, doubtless, decide herein whether or not Judicial review can be given to a decision of the Secretary of the Interior in the approving or failing to approve the Will of Indian testators and this decision will perhaps be promulgated even though the former decisions of this Court relative to the fact that there is no jurisdiction to give Judicial review of the decision of the Secretary of the Interior in determining the heirs of decedent Indians who die intestate are left in tact and are not disturbed by the Court at the present time.

ARGUMENT

I

THE REFUSAL OF THE SECRETARY OF THE INTERIOR TO APPROVE THE WILL OF THE DECEDENT INDIAN HEREIN FOR EQUITABLE REASONS AMOUNTED TO THE SECRETARY OF THE INTERIOR SUBSTITUTING HIS WILL FOR THAT OF THE INDIAN TESTATOR, WHICH REFUSAL OF THE SECRETARY OF THE INTERIOR WAS CONTRA TO THE INTERPRETATION THAT WAS FORMERLY GIVEN TO THE STATUTES AUTHORIZING APPROVAL OF WILLS OF INDIAN TESTATORS BY THE SECRETARY OF THE INTERIOR AND ALSO CONTRA TO THE REGULATIONS AND RULES PROMULGATED BY THE SECRETARY OF THE INTERIOR AND THE COMMISSIONER OF INDIAN AFFAIRS RELATIVE TO THE EXECUTION OF WILLS BY INDIAN TESTATORS PURSUANT TO SAID STATUTES.

The legatees and devisees of the Indian testator state that the Secretary of the Interior by refusing to approve the Will of George Chabsenah, the Indian testator, for equitable reasons took a position contra to the interpretation that was formerly given by the Secretary of the Interior and the Courts to 25 U.S.C. 373.

The legatees and devisees of the Indian testator further state that the Bureau of Indian Affairs and the Secretary of the Interior originally interpreted that the Secretary of the Interior was without authority to change the provisions of the Will of an Indian and the authority for this interpretation is the 1958 revision of the

Indian Law Book published under the authority of the United States Department of the Interior at Page 813, which states as follows:

> "The authority of the Secretary of the Interior is limited to approval or disapproval of an Indian will, and he is without authority to change the provisions of the will by making a different provision than that provided by the testator." (Memo. Sol. I.D., May 10, 1941.)

The legatees and devisees of the Indian testator further state that the Solicitor's Memorandum of May 10, 1941, referred to in the citation from the Indian Law Book supra is set out verbatim (App. B 1-3) infra and the refusal of the Secretary of the Interior to approve the Will of the decedent Indian herein for equitable reasons amounted to the Secretary of the Interior substituting his will for that of the Indian testator and was not permissible pursuant to the Solicitor's Memorandum of May 10, 1941, supra.

The legatees and devisees of the Indian testator further state that the Secretary of the Interior in prior decisions, has not used the equity theory as a reason for the withholding of approval of Wills of Indian testators. The legatees and devisees wish to call to the attention of the Court the Estate of Wook-Kah-Nah, deceased Comanche Allottee No. 927, which is IA-855 and has been published in the Interior Decisions and is cited at 65 ID 436. This decision was rendered by the acting Solicitor for the Department of the Interior on October 21, 1958, whereon on Appeal, he approved the decision of the Examiner of Inheritance,

who had approved in the hearing before him, the last Will and Testament of Wook-Kah-Nah. Wook-Kah-Nah left as her heirs at law, six children and two grandchildren and in her Will she gave the lands on which there were valuable oil wells to two of her children. In other words, two of her children were favored far beyond the rest of her children and grandchildren. In evidence produced at the hearing before the Examiner of Inheritance, it was found that she was an illiterate, aged Indian woman who could not read or write, but nevertheless, the acting Solicitor of the Department of the Interior approved the Will and he made the following statement in his Opinion approving the Will and in approving the Opinion of the Examiner of Inheritance:

> "It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made of February 20, 1954."

If the Solicitor would have desired to use the equity theory, he could have withheld the approval of the Will of Wook-Kah-Nah

and he could have stated that equity would be disbursed more evenly if the oil runs were disbursed among her children instead of going to two of her children as her Will provided.

The legatees and devisees of the Indian testator further state that another case where the Secretary of the Interior and the Court could have used the equity theory for disapproving the Will of an Indian testator if that is the proper and correct theory, is the case of Homovich vs. Chapman, 191 F. 2d 761 (D.C. Cir. 1951). Herbert Homovich was a Comanche Indian who made his Will on June 4th, 1947, wherein he left his estate consisting of valuable oil properties to various collateral heirs and subsequently thereto on April 10th, 1948, the decedent was married to Neoma Homovich. Later the same year and on September 30, 1948, Homovich died without changing or revoking his Will. His widow, Neoma Homovich, made an attack on his Will and the principal ground for her attack was that the Will was revoked by the operation of Oklahoma Law, which Oklahoma Law provided that a Will is revoked if the testator marries after the Will was executed. It was held in the hearings before the Department of the Interior and in the Federal Courts that the Oklahoma Law had no application to the validity of Wills of Indians disposing of their restricted and trust property and therefore there was no revocation of the Will of Herbert Homovich and his Will was upheld. If Homovich's Will had been disapproved for equitable reasons, his Estate would have descended and vested by intestate succession to his widow and his mother. His Will which was approved by the Secretary of the Interior distributed his Estate to various collateral relatives

who were not his next of kin because he omitted his mother, two sisters, a brother and, of course, his widow from the terms of his Will. The Secretary of the Interior and the Federal Courts, apparently in 1951, disagreed with the theory now promulgated by the Secretary of the Interior that the Wills of Indian testators may be left unapproved if the Wills do not make an equitable distribution and consideration of the Indians heirs at law. (App. 84-85).

> "When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law." (Footnote deleted).

The legatees and devisees of the Indian testator further state that the applicable Code of Federal Regulations that were in effect when the Will of George Chahsenah was made and are still applicable are found in (App. A 1-4) infra. An examination of the said Regulations show a complete absence of any Regulations regarding the theory that the Will of the Indian testator must be equitable in so far as the heirs at law of the decedent Indian are concerned. A study of the Regulations will reveal that the Regulations governing the approval or disapproval of the Will of an Indian testator by the Secretary of the Interior are similar to and in the same manner as a Court sitting for the purpose of probating or disapproving

Wills of non-Indian testators for the usual customary reasons and grounds. The Courts attention is directed particularly to paragraph 15.3 of said Regulations:

> "§ 15.3 Contents of notice. The notice shall state that the examiner of inheritance, will at the time and place specified therein, take testimony to determine the heirs of the deceased Indian (naming him) and, if a will is offered for probate, testimony as to the validity of such will. The notice shall list the presumptive heirs of the decedent, and if a will is offered for probate, the beneficiaries under such will and the attesting witnesses to the will. The notice shall cite the regulations in this part as the source of the legal authority and jurisdiction for the holding of the hearing. * * *" (Emphasis Added).

The legatees and devisees of the Indian testator believe that the import of the Regulations issued by the Secretary of the Interior, which have the force and effect of law, are for the purpose of having a hearing in the manner of a Judicial hearing to prove the proper factum of the Will and that the Indian testator was free from undue influence and that he had proper mental capacity, and the Court will observe that the Regulations are entirely silent concerning Regulations directing the Indian to make an equitable devise of his estate in so far as his heirs at law are concerned.

Further proof of the absence of the equity theory for the interpretation of Indian testators can be found in Hanson vs.

Hoffman, 113 F. 2d 780 (10th Cir. 1940) at Page 789:

> "It will be observed that under 25 U.S.C.A. § 373, supra, the death of Benjamin and the approval of the will did not free the allotments from restrictions, nor terminate the trust respecting the properties held by the Secretary. The three allotments remained restricted and the moneys derived therefrom, both before and subsequently to the death of Benjamin, and the lands conveyed to the Secretary remained subject to the trust, and to administration and control by the Secretary.
>
> The restricted property and trust funds still being under the administrative control of the Secretary of the Interior, there can be no doubt of the power of the Secretary to have set aside the approval of the will on the ground of fraud in the execution of procurement of the will within one year from the date of the death of Benjamin, and to set aside the approval at any time on the ground of lack of testamentary capacity, undue influence, or failure to comply with the rules and regulations in connection with the execution of the will, or on the ground of fraud, failure of subordinate officers to report the true facts to the Secretary, or other like grounds whereby approval of the will was induced. Lane v. U.S. ex rel. Mickadiet, 241 U.S. 201, 207-209, 36 S. Ct. 599, 60 L.Ed. 956; Nimrod, v. Jandron, 58 App. D.C. 38, 24 F. 2d 613."

The legatees and devisees of the Indian testator direct the Court to another example that the equity theory has not been the criterion for the approval or disapproval of Wills of Indian testators in the past and we refer to Instructions to Field Officers (App. 66-67) and particularly Paragraph 3:

> "3. Witnesses and testator must sign in the presence of each other. Read the will carefully to testator and be sure that he understands it and that it expresses his wishes." (Emphasis Added).

We thus see that the instructions that were given to the Field Attorneys of the Department of the Interior instructed them to make certain that the Will expressed the desire and will of the Indian testator relative to the distribution of his estate. The Affidavit of the scrivener of the Will (App. 69) is a detailed Affidavit relative to the customary requirements for the execution of a valid Will, but again no mention is made in the Affidavit of a requirement that the testator has performed equity in his Will in so far as his heirs at law are concerned. We direct the Court to the FOURTH paragraph of the last Will and Testament of George Chahsenah (App. 64):

> "FOURTH: I leave nothing to my heirs at law except those persons hereinbefore mentioned for the reason that they have shown no interest in me."

which statement gave the reason of George Chahsenah for excluding from his Will all of his heirs at law other than the devisees and legatees named in said Will who, of course, are

the Petitioners herein except for certain parties who have been substituted due to the death of a portion of the devisees and legatees. The exclusion included Dorita High Horse, who was found to be the natural daughter of George Chahsenah by the Examiner of Inheritance and by the Secretary of the Interior on appeal, but the validity of said finding did not completely convince Judge Eubanks of the Trial Court that Dorita High Horse was the natural daughter of George Chahsenah, the decedent herein because the birth certificate prepared at the time of the birth showed the father of Dorita High Horse to be another person other than George Chahsenah. (Footnote 6, App. 32-33).

The legatees and devisees of the Indian testator further state that there is no general requirement and it is contra to the general accepted Law of Wills that testators must make Wills in an equitable manner. A valid statement of the General Law can be found in Page on Wills Revised Treatise 1960, Volume 1, Pages 88, 89, and 90:

> "§ 3.11 Power to make unfair, unnatural will
> A statute which regulates the scheme of succession by intestacy has no bearing in the determination of the validity of a will that departs from the intestate formula nor does it in any way render such a will invalid. Obviously, the very purpose for which freedom of testation is given is to facilitate a departure from the inflexible laws of inheritance and to permit a testator to discriminate among his children and other objects of his bounty according to the dictates of his personal sense of justice. For this reason, departure from the intestate scheme on the part of the testators is more to be anticipated than is conformity thereto. The

power to make a will is a power that belongs to the testator and is not a veto power of the court or jury. Within the limits fixed by statute, the testator may dispose of his property by will as he pleases. (Emphasis Added).

The fact that the disposition of the testator's property made by the will is capricious, unjust, spiteful, eccentric, revengeful or injudicious does not of itself render the will invalid. If the testator had mental capacity and was free of undue influence and fraud, testamentary freedom is his to do with as he pleases, subject only to statutory restrictions." (Voluminous Footnotes deleted).

The legatees and devisees of the Indian testator in conclusion for Part I of Argument state that the Courts show "great deference to the interpretation given (a) statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 85 S. Ct. 792, 801, 13 L. Ed 2d 616; Gardner vs. Brian, 369 F.2d 443 (10th Cir.). It is their considered opinion that the Secretary of the Interior without a change in the applicable Regulations or without a change in the applicable Statutes should not change his previous interpretation of the Regulations and Statutes, which he did by using the equitable theory as his reason for not approving the Will of the decedent testator Indian, which theory was contra to the previous interpretation given to the applicable Statutes and Regulations by the Secretary of the Interior and by the Courts.

II

SECTION 1 OF THE 1910 ACT (25 U.S.C. 372) AND SECTION 2 of the 1910 ACT AS AMENDED (25 U.S.C. 373) SHOULD NOT BE HELD AND CONSIDERED AS COMPLEMENTING EACH OTHER WITH RESPECT TO THE FINALITY OF THE ADMINISTRATIVE DETERMINATION OF FACTS BY THE SECRETARY OF THE INTERIOR RELATIVE TO THE DETERMINING OF HEIRS AT LAW OF DECEASED INTESTATE INDIANS (25 U.S.C. 372) AND THE APPROVAL OR DISAPPROVAL OF WILLS OF DECEASED INDIANS (25 U.S.C. 373) AND SECTION 1 OF THE 1910 ACT (25 U.S.C. 372) SHOULD NOT BE HELD TO PRECLUDE JUDICIAL REVIEW EVEN THOUGH THE PHRASEOLOGY "FINAL AND CONCLUSIVE" IS CONTAINED IN THE SAID STATUTE.

The legatees and devisees of the Indian testator realize that Part II of their Argument as set out immediately above is almost a direct converse of the statements and findings of the Court of Appeals for the Tenth Circuit in certain cases that will be hereinafter set out.

The first case of the Court of Appeals for examination is Heffelman vs. Udall, 1967, 10th Cir., 378 F.2d 109, cert. den. Nov. 7, 1967, 389 U.S. 926, 88 S. Ct. 287, 19 L. Ed 2d 278. This case concerned an Estate of an unallotted Quapaw Indian who died testate leaving a Will with the proviso in her Will that if she remarried, one-third of her estate would vest in her surviving husband. One Charles W. Heffelman made a claim in the administrative hearings that he was the

common law husband of Louise Wilson, the decedent. The Secretary of the Interior made a determination that Heffelman was not the husband of the decedent Indian. An action was filed in the United States District Court for review of the decision of the Secretary of the Interior pursuant to the Administrative Procedure Act and the action was dismissed by the United States District Court. Circuit Judge Lewis on appeal upheld the dismissal of the action by the United States District Court and Circuit Judge Lewis said in part at Page 112 as follows:

> "'* * * Rather, we are urged to hold that the absence or presence of a will is the determinative premise upon which jurisdiction to review the Secretary's finding of a question of fact is dependent. To so hold, we believe, would reduce 'the act of Congress (the Act of June 25, 1910) * * * to impotence by its contradictions.' Blanset v. Cardin, 256 U.S. 319, 325, 41 S. Ct. 519, 522, 65 L.Ed. 950. Certainly, if Louise Wilson had died intestate, the rejection of appellant's claim to heirship and the Secretary's finding would not be subject to judicial review. Henrietta First Moon v. Starling White Tail, 270 U.S. 243, 46 S.Ct. 246, 70 L.Ed. 565. While there may be legal distinctions to be drawn between the claim of an heir and the claim of a legatee, it would be illogical and contrary to the whole history of laws governing Indian property to ascribe to Congress by way of a negative inference an intention to provide the Secretary of

> the Interior with unfettered discretion on the one hand but not on the other. We think that as long as an Indian allotment remains subject to the Secretary's control, cf. Hanson v. Hoffman, 10 Cir., 113 F. 2d 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act.'" 378 F.2d 112. (Footnote deleted).

On Appeal, Judge Lewis held that Sections 1 and 2 of the 1910 Act complemented each other and the final and conclusive clause of Section 1 therefore also applied to Section 2 of the 1910 Act and therefore there was no jurisdiction to give Judicial review to a decision of the Secretary of the Interior relative to the approval or disapproval of the Will of an Indian testator. The Trial Court in the Heffelman case supra did not take jurisdiction in mandamus pursuant to 28 U.S.C. 1361, which jurisdiction was taken by the Trial Court in the case under consideration in addition to jurisdiction under the Administrative Procedure Act.

The next decision by the Court of Appeals for the Tenth Circuit is Attocknie vs. Udall 390 F.2d 636 (10th Cir. 1968), Cert. den. 393 U.S. 833, 89 S.C. 104, 21 L.Ed 2d 104. Circuit Judge Seth in his opinion reviewed the facts of the case which facts were that the Examiner of Inheritance and the Secretary of the Interior on appeal both had held that even though the Indian testator made a provision in his Will which stated that I leave nothing to Willis Attocknie because he is not my son and

even though Willis Attocknie was the illegitimate son of the decedent, the Will was upheld and held to be a valid Will. Circuit Judge Seth held on the authority of Heffelman vs. Udall, 378 F.2d 109 (10th Cir. 1967) that Section 1 and Section 2 of the Act of 1910 (25 U.S.C. 372-373) complement each other with respect to the finality of the Administrative determination of facts and that such a determination came within the jurisdiction exception stated in Section 10 of the Administrative Procedure Act and therefore the United States District Court did not have jurisdiction under the Administrative Procedure Act to give Judicial review to the actions of the Secretary of the Interior in approving or disapproving the Will of deceased Indian testators.

The legatees and devisees of the Indian testator believe that Attocknie vs. Udall supra was the first time that any United States Court of Appeals held directly in point that the United States Courts did not have jurisdiction to give Judicial review to the approval or disapproval of the Will of a deceased Indian testator pursuant to 25 U.S.C. 373 and that the final and conclusive prohibition found in 25 U.S.C. 372 applies to 25 U.S.C. 373 and therefore the legal review was not permissible under the Administrative Procedure Act which Act provides that Judicial review cannot be given under said Act if there is statutory prohibition against review.

The Court of Appeals for the Tenth Circuit a short time later when this case now under consideration by this Court came on for hearing, High Horse vs. Tate, 407 F.2d 394 (10th Cir. 1969), held that the District Court of the United States did not have jurisdiction to give Judicial review of

the action of the Secretary of the Interior in approving or disapproving Wills of Indian testators affecting their restricted Indian property and the Court gave as authority for said holding its recent decision in Heffelman vs. Udall supra and Attocknie vs. Udall supra.

The legatees and devisees of the Indian testator would like to call to the attention of the Court the 1958 Revision of the Indian Law Book published under the authority of the United States Department of the Interior relative to Section 1 and Section 2 of the 1910 Act together with other Sections of the 1910 Act and from said book there appears at Pages 122 and 123 the following:

> "The act of June 25, 1910,[6] constituted what is probably the most important revision of the General Allotment Act that has been made. Based on 33 years of experience in the administration of the act, it sought to fill gaps and deficiencies brought to light in the course of that period. These related particularly (a) to the administration of estates of allottees, (b) to the making of leases and timber contracts for allotted lands, and (c) to the cancellation or relinquishment of trust patents.
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> Section 1 of this act [7] set forth a comprehensive plan for the administration of allottees' estates, con-

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6 36 Stat. 855.
7 36 Stat. 855, 25 U.S.C. 372

ferring plenary authority upon the Secretary of the Interior to administer such estates and to sell heirship lands. Section 2 [8] authorized testamentary disposition of allotments with the approval of the Secretary of the Interior and the Commissioner of Indian Affairs. Section 3 [9] permitted relinquishment of allotments by allottees in favor of unallotted children, who had been completely ignored in the original scheme of allotment to living Indians.

Section 4 of the act [10] permitted leasing of Indian allotments held by trust patent for periods not to exceed 5 years in accordance with regulations of the Secretary of the Interior, and conferred upon the Secretary power to supervise or expend for the Indians' benefit the rentals thereby received. Section 5 [11] made it unlawful to induce an Indian to execute any conveyance of land held in trust, or interests therein. Section 6 [12] contained various provisions for the protection of Indian timber against trespass and fire. Section 7 [13] contained a

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8 36 Stat. 855, 856, 25 U.S.C. 373.
9 36 Stat. 855, 856, 25 U.S.C. 408.
10 36 Stat. 855, 856, 25 U.S.C. 403.
11 36 Stat. 855, 857, 25 U.S.C. 202.
12 36 Stat. 855, 857, 18 U.S.C. 1153, 1156.
13 36 Stat. 855, 857, 25 U.S.C. 407.

general authorization for the sale of timber on unallotted lands under regulations prescribed by the Secretary of the Interior. Section 8 [14] contained a similar authorization for timber sales on restricted allotted lands.

Section 13 of the act [15] authorized the Secretary of the Interior to reserve from entry Indian power and reservoir sites, and the following section [16] authorized the Secretary of the Interior to cancel patents covering such sites upon making allotment of other lands of equal value and reimbursing the Indian for improvements on the canceled allotment. Other sections contained minor amendments to the General Allotment Act and related legislation. [17]

The provision of this act relating to testamentary disposition of allotments was amended and amplified by the act of February 14, 1913. [18] As amplified, the privilege of testamentary

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14 36 Stat. 855, 857, 25 U.S.C. 406.
15 36 Stat. 855, 858, 43 U.S.C. 148.
16 36 Stat. 855, 859, 25 U.S.C. 352.
17 See sec. 16, 36 Stat. 855, 859 (incorporated in 25 U.S.C. 312) (rights-of-way); Sec. 17, 36 Stat. 855, 859 (incorporated in 25 U.S.C. 331) (amending secs. 1 and 4 of the original allotment act); sec. 31, 36 Stat. 855, 863, 25 U.S.C. 337 (allotments within national forests).
18 37 Stat. 678. See 25 U.S.C. 373.

> disposition subject to departmental approval was extended not only to Indians possessed of allotments, but also to Indians having individual Indian moneys or other property held in trust by the United States. [19]"

This Court will observe that the Act of 1910 was an important revision of the General Allotment Act of 1887 and the said Act was composed of many different sections on various phases of Indian Law. The Court will further observe that Section 2 of the Act of 1910 was amended by the Act of February 14, 1913, and after the said amendment, it was not necessary to have the approval of the Commissioner of Indian Affairs for a Will made by an Indian as was required by the original Act of 1910, and after the amendment by the Act of 1913, the privilege of testamentary disposition with departmental approval was extended to Indian individuals having moneys or other property held in trust, which authority is not given to Indians dying intestate and whose estates are probated pursuant to Section 1 of the Act of 1910, (25 U.S.C. Sec. 372). It appears to the legatees and devisees that the argument that Section 1 of the said Act complements Section 2 of the said Act is not valid. Each Section of the Act of 1910 is a separate Section and each Section stands on its own contents as set out in said Section. The argument that Section 1 complements Section 2 of the said Act was presented by the Secretary of the Interior

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19 See also S. Rept. 720, 62d Cong., 2d sess., May 9, 1912, on H.R. 1332.

in Homovich vs. Chapman, 191 F.2d 761 in 1951 and in rejecting this argument the United States Circuit Court of Appeals for the District of Columbia Circuit stated at Page 764 as follows:

> "(5) The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts, [5] and no case to the contrary is cited to us. Such review is not precluded by the statute. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will, provides that his determination 'shall be final and conclusive', therefore Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in pro-

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5 See cases cited note 4 supra; also Nimrod v. Jandron, 1928, 58 App. D.C. 38, 24 F.2d 613.

viding regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) [6] forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. He says that

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6 60 Stat. 243 (1946), 5 U.S.C.A. § 1009. See discussion in Kristensen v. McGrath, 1949, 86 U.S. App. D.C. 48, 179 F.2d 796 (not discussed by Supreme Court, McGrath v. Kristensen, 1950, 340 U.S. 162, 169, 71 S.Ct. 224, 95 L.Ed. 173; also in Air Line Dispatchers Ass'n, et al, v. National Mediation Board, et al. 1951, 89 U.S. App. D.C., _____, 189 F.2d 685, and also in Capital Transit Company v. United States, 1951, D.C., 97 F. Supp. 614.

there can be no review where agency action 'involves' an element of discretion or judgment. Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity.

The judgment of the District Court must be and is hereby

Affirmed."

The legatees and devisees of the Indian testator also wish to state that Judicial review under Section 2 of the Act of 1910 (25 U.S.C. Sec. 373) was given and jurisdiction taken by the District of Columbia Circuit for the Court of Appeals in Asenap vs. Huff, 312 F.2d 358 (1962). In the Per Curiam Opinion, the District of Columbia Court of Appeals stated that the examination of the Administrative record convinced the Court that the Secretary of the Interior was not acting in an arbitrary and capricious manner when he upheld the Will in question and therefore the United States District Court should have granted Summary Judgment with the result that the decision of the Secretary of the Interior approving the Will would not be set aside and the case was remanded accordingly. The Administrative record in question pertained to the Estate of Wook-kah-Nah, Comanche Allottee No. 927 which facts have been previously discussed in Argument I of this Brief under the citation of 65 ID 436. It is patent that the Court of Appeals for the District of

Columbia has, at least on two occasions, taken jurisdiction and given Judicial review to the approval or disapproval of the Wills of Indian testators pursuant to 25 U.S.C. 373; the cases being Homovich vs. Chapman supra and Asenap vs. Huff supra.

The legatees and devisees of the Indian testator are also cognizant of another important case decided by the Court of Appeals for the District of Columbia Circuit cited as Hayes vs. Seaton 270 F.2d 319 (1959), Cert. den. 374 U.S. 814, Rehearing for Cert. den. 364 U.S. 906. The legatees and devisees of the Indian testator are not going to make a detailed statement concerning this case in their Brief herein. The legatees and devisees of the Indian testator did state in their Brief for the case under consideration filed in the United States Court of Appeals for the Tenth Circuit in June, 1968, that they were in accord with the dissenting opinion in Hayes vs. Seaton supra, which opinion was rendered by Circuit Judge Burger and in their Brief of 1968 a considerable portion of the said dissenting opinion was quoted. They suggested in their Brief of June, 1968, that the Court of Appeals for the Tenth Circuit render a decision in accordance therewith in favor of the legatees and devisees of the Indian testator and that the United States District Court had jurisdiction to give Judicial review to the approval or disapproval of Wills of Indian testators under the Administrative Procedure Act and not mandamus, which suggestion was rejected by the Court of Appeals for the Tenth Circuit, as aforestated.

The legatees and devisees of the Indian testator are of the opinion that the reasons given by Circuit Judge Burger, now Justice Burger, for Judicial review in Hayes vs. Seaton

supra were, at that time persuasive and valid and are still persuasive and valid. Justice Burger, in his dissenting opinion in Hayes vs. Seaton supra, quoted from a Harvard Law Review article by Louis L. Jaffe. Professor Jaffe has now compiled having published in 1965 a treatise styled Judicial Control of Administrative Action and at Page 143 the following quote appears to your legatees and devisees herein to be persuasive of the position of your legatees and devisees herein:

> "A statute may indeed exclude all occasions of judicial intervention. But a court will not lightly assume that an agency has been empowered to adjudicate any controversy which it chooses, and once this is granted, the notion of 'jurisidctional' limit enters the picture. Therefore, though the concept of jurisdiction is imprecise, a court will ordinarily assume that it has both the power and the duty to determine a question asserted to be jurisdictional. Behind such an assumption, of course, there stands the major premise that the judiciary is the ultimate guarantor of legality, that judicial control of official action is, therefore, the rule, and exclusion the exception."

The legatees and devisees of the Indian testator are cognizant of the many cases that have been decided by this Court under different Statutes, such as the draft statute and the immigration statute where the statute contains the phraseology that the administrative decision is final or final and conclusive. Nevertheless, this Court has taken jurisdiction and granted Judicial review of the administrative decisions in many instances. A prime example of giving Judicial review to a statute of this nature is the case of Estep vs. U.S. 327 U.S. 114, 66 S.Ct. 423, 90 L. Ed 567 (1946).

Another case that the legatees and devisees of the Indian testator would like for this Court to examine is Simmons vs. Eagle Seelatsee, E.D. Wash. 1965, 244 F. Supp. 808, aff'd without opinion, 384 U.S. 209, 86 S. Ct. 1459, 16 L.Ed. 2d 480. This litigation concerned a complaint against the Yakima Tribal Council, which had determined that the Plaintiffs would not receive any part or portion of a certain trust and restricted estate because they did not have one-fourth (1/4) or more blood of the Yakima tribe. The pleadings developed that the Examiner of Inheritance had made a finding that the Plaintiffs did not qualify to take as a heir of the deceased Indian because of the inability to meet the requirements of one-fourth (1/4) or more blood of the Yakima tribe, which determination by the Examiner was made pursuant to 25 U.S.C. Sec. 372. The United States intervened in the said suit and they filed a Motion to Dismiss the action primarily on jurisdictional grounds. The Court was sitting as a Court of three Judges due to the fact that the constitutionality of the Statute requiring the Indians to have one-fourth (1/4) or more blood of the Yakima tribe before they could inherit had been questioned. Judge Pope in rendering his decision of the three Judge Court stated as follows:

Pages 811 and 812:

> "As we inquire whether on this record we can reach the merits of this case we are confronted with two statutory provisions. One is § 1 of the Act of August 15, 1894, c. 290, 28 Stat. 305 (25 U.S.C. § 345) set forth in the

margin, [5] which provides in substance that a person who is in whole or in part of Indian blood or descent-who is entitled to an allotment or who claims to have been unlawfully denied or excluded from any allotment may litigate his rights and claims in the proper district court of the United States, naming the United States as party defendant.

The important question at this point arises from the second and later enactment of the Act of June 25, 1910, c. 431, § 1, 36 Stat. 855 (25 U.S.C. § 372). This section provides that when an Indian to whom an allotment has been made dies before the expira-

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5 "§ 345. Actions for allotments-All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; * * *

tion of the trust period 'the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.'

(1) As was noted in Arenas v. United States, 9 Cir., 197 F.2d 418, 420, 'the enactment of June 25, 1910 operated to withdraw from the courts jurisdiction to ascertain the heirs of the dead allottees holding under trust patents', citing Hallowell v. Commons, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409, United States v. Bowling, 256 U.S. 484, 487, 41 S.Ct. 561, 65 L.Ed. 1054, and other cases.

If we apply that rule literally, if we say, using the words of the last mentioned Act that the decision here of the Secretary shall be 'final and conclusive', and at the same time recognize that there is here a substantial question of constitutional law, then we would be holding that the Secretary could act in an unconstitutional manner, and that his action could not be questioned;-that he had the power finally to determine a constitutional question.

Such a construction of this 'final and conclusive' provision can neither be thought to be within the intent of Congress nor can it be consistent with due process. A provision requiring such a construction would be wanting in due process. Such is the holding of Ng Fung Ho v. White, 259 U.S. 276, 284-285, 42

> S. Ct. 492, 495, 66 L. Ed. 938.[6] It has been held that the action of the Secretary under this section of the Act of June 25, 1910, (25 U.S.C. § 372) is subject to review in a court of equity in a direct proceeding 'to inquire into and correct mistakes, injustice and wrong in both judicial and executive action.' Hanson vs. Hoffman, 10 Cir., 113 F.2d 780,791. * * * (Footnote deleted).

The legatees and devisees of the Indian testator believe that this Court could very well make a judgment that due process is wanting as exemplified in Simmons vs. Seelatsee supra if same is used to prevent the Secretary of the Interior to give legal review to the action of the Secretary of the Interior under 25 U.S.C. 372, which of course would be a reversal of its earlier decisions made when the philosophy of the Court was different than it is at the present time and A Fortiori same argument applies to 25 U.S.C. 373 although the legatees and devisees of the Indian testator do not admit that 25 U.S.C. 372 and 25 U.S.C. 373 are complementary to each other in so far as the final and conclusive clause is concerned.

The legatees and devisees of the Indian testator presume this Court has noted that it confirmed and approved Simmons vs. Seelatsee supra without an opinion and the said case was held before three Judges therefore the opinion of the lower Court should be more persuasive than in many cases determined by the United States District Courts.

The legatees and devisees of the Indian testator further state that this Court has firmly established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress and this Court has echoed this theme by noting that the Administrative Procedure Acts generous review provisions must be given a hospitable interpretation, Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed 2d 681 (1967), Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L. Ed. 868, United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 St. Ct. 1410, 1414-1415, 93 L. Ed. 1451; Brownell v. We Shung, 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 2d 225; Heikkila v. Barber, 345 U.S. 229, 73 S. Ct. 603, 97 L. Ed 972.

The legatees and devisees of the Indian testator further state that Abbott Laboratories vs. Gardner supra which held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," greatly expands the catagory of Plaintiffs who have standing to demand non-statutory review when applied to persons aggrieved or adversely affected and the legatees and devisees of the Indian testator and the Petitioners herein, are greatly aggrieved persons and adversely affected persons and should be granted jurisdictional review.

The legatees and devisees of the Indian testator believe that their Complaint stated a cause of action in equity against the Secretary of the Interior and the Administrative Procedure Act did not particularly enlarge the equitable grounds for relief if there are equitable grounds for relief. In Dixon vs. Cox 268 F. 285 (8th Cir. 1920) Circuit Judge Sanborn in discussing the complaint concerning Judicial review of the Secretary of the Interior's decision relative to Section 1 of the Act of 1910 (25 U.S.C. 372) stated at 289 as follows:

> "The second question is: Did the complaint or proof in this suit set forth a cause of action in equity to avoid the Secretary's decision for fraud, error of law, or absence of substantial evidence to sustain it? Whether or not the weight of evidence in substantial conflict sustains one or the other side of an issue of fact is a question upon which the final decision of the Secretary in a case of this character is generally final and conclusive; but his decision upon this issue of heirship, like the decision of the Land Department, of the Dawes Commission, and of other quasi judicial tribunals, may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a

> material issue of fact which controlled the result. James v. Germania Iron Company, 107 Fed. 597, 600, 601, 46 C.C.A. 476, 479, 480; Howe v. Parker, 190 Fed. 738, 746, 111 C.C.A. 466, 474.: (Emphasis Added).

The legatees and devisees of the Indian testator believe in the case under consideration they have come within the reason set out for relief in equity even if it should be held that the final and conclusive clause applied to 25 U.S.C. 373 even though the said clause is not expressly stated in the said Statute.

The legatees and devisees of the Indian testator remind this Court that in their Motion for Summary Judgment (App.25) the following, to-wit:

> "3. The Defendant (The Secretary of the Interior) ignored the significant and substantial evidence offered on the controverted facts and made an erroneous decision which was contrary to Law."

was one of the several grounds that was given as a reason for the Court to sustain the Motion, which Motion was by the Trial Court sustained and granted and it is the opinion of the legatees and devisees herein that this ground comes within the express authority of Dixon vs. Cox supra.

III

THE TAKING AND EXERCISE OF JURISDICTION HEREIN BY THE TRIAL COURT PURSUANT TO 28 U.S.C. 1361 IS A VALID AND PROPER DETERMINATION BY THE TRIAL COURT EVEN THOUGH "FINAL AND CONCLUSIVE" MIGHT BAR JURISDICTION HEREIN UNDER THE APA.

The legatees and devisees of the Indian testator state that Judge Eubanks, the Judge in the Trial Court in the case under consideration, (App. 27-37 at Footnote 1, Page 28) stated as follows:

> "There can be no doubt but that this court has jurisdiction under 28 U.S.C. § 1361, and upon that basis jurisdiction is taken here, as it has been by this court upon other occasions, in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates."

Therefore, we see that in the Trial Court jurisdiction was taken by Judge Eubanks under 28 U.S.C. § 1361.

The legatees and devisees of the Indian testator further state that in Heffelman vs. Udall, 378 F.2d 109 (10th Cir., 1967) on appeal, the principal consideration of the Court of Appeals was that APA did not apply and permit Judicial review of the action of the Secretary of the Interior relative to

the approval or disapproval of the Estates and Wills of Indians because of the final and conclusive clause of Section 1 and Section 2 of the Act of 1910, (25 U.S.C. 372 and 25 U.S.C. 373). The Court of Appeals in Heffelman supra also stated that the Trial Court in Heffelman properly held that there was no jurisdiction under 28 U.S.C. § 1361, which is the exact converse of what the Trial Court did in this case under consideration because jurisdiction was expressly taken by the Trial Court under the authority of 28 U.S.C. § 1361. Consequently, Heffelman supra was not proper authority for the Court of Appeals for the Tenth Circuit for the reversal of this case.

The legatees and devisees of the Indian testator further state that Judge Eubanks, the Judge in the Trial Court (App. 27-37, Page 35) stated as follows:

> "Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right."

and the Trial Court further held that the denial of the approval of the Will by the Secretary of

the Interior acting by and through the Regional Solicitor of George Chahsenah lacked a rational basis and was an unreasonable and arbitrary denial of the right conferred by Congress upon the decedent Indian to make his Will, and therefore the Trial Court directed in the nature of a mandamus that the Secretary of the Interior approve the Will of the decedent Indian and distribute his estate in accordance with the provisions of the said Will.

The legatees and devisees of the Indian testator further state that authority for mandamus of the Secretary of the Interior was determined as a proper procedure in a similar situation by this Court, Garfield vs. United States of America, ex rel Goldsby, 211 U.S. 249, 29 S.C. 62, 53 L. ed. 168 (1908). The Secretary of the Interior was brought into Court for a writ of mandamus to require him to erase certain marks and notations by which his predecessor had taken Goldsby off of the approved membership rolls of the Chickasaw Indian Nation and for the further request that he be restored as a member of said Nation. This Court granted Goldsby the relief he requested.

Another decision by this Court is Lane vs. Hoglund, 244 U.S. 174 (1917), 61 L. ed. 1066, 37 S.C. 558. A writ of mandamus was issued against Franklin K. Lane, the Secretary of the Interior, by the Court of Appeals for the District of Columbia and on Appeal, this Court affirmed the Court of Appeals. The action was for a mandamus against the Secretary of the Interior to issue a patent to a homestead entryman where two (2) years had lapsed since the receiver's receipt of final entry and there was no pending contest or protest.

The legatees and devisees of the Indian testator believe that Lane vs. Hoglund supra can be compared with the case under consideration in many respects in so far as mandamus is concerned. This Court said in Lane vs. Hoglund supra that jurisdiction arises out of the situation that construction of the Statutes of the United States and the duty of the Secretary of the Interior thereunder are drawn in question, which statement also applies to the case under consideration herein. In Lane vs. Hoglund supra, there was a hearing held relative to the validity of the homestead entry before the local officers and the Commissioners of the Land Office relative to whether the homestead entry had been properly consumated. The local land officers found in favor of the entryman, but on appeal, the Secretary of the Interior reversed and ruled that the entry was not protected by the applicable two (2) year Statute and held that the entry had not been properly consumated by the entryman. In the case under consideration, the Examiner of Inheritance held the Will of the decedent Indian should be approved, but on Appeal the Secretary of the Interior held otherwise giving noncompliance with equity by the Indian testator as his reason for not approving the Will.

In Lane vs. Hoglund supra, this Court held that the practice had long been maintained that there could not be a valid protest of the entry within a two year period except by a public agent or a private citizen, which objected to the validity of the entry by the entryman and when an attempt was made based on a report by a forest officer to object to the validity of the entry made by the entryman, the

Secretary of the Interior was without authority to set aside the entry on the homestead and was subject to mandamus, which mandamus was granted. In arriving at this conclusion, this Court made a study of the prior administrative rulings of the Secretary of the Interior and also instructions given to the Field Offices. Similar material has been heretofore set out in this Brief supra for the benefit of this Court.

Near the conclusion of Lane v. Hoglund supra, we find the following pertinent statement by this Court in the U.S. Reports:

> "True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; United States v. Schurz, 102 U.S. 378, 26 L. ed.167, Roberts v. United States, 176 U.S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; Garfield v. United States, 211 U.S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62; Ballinger v. United States, 216 U.S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338. And see Noble v. Union River Loging R. Co. 147 U.S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. This, we think, is such a case. As quite apposite we excerpt the following from the unanimous

opinion in Roberts v. United States, 176 U.S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376:

> 'Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. * * *'"

The legatees and devisees of the Indian testator realize that prior to 1962 when a mandamus action was commenced against public officials such as the Secretary of the Interior, the applicable Court decision required same to be brought in the District of Columbia. The limitation of venue and jurisdiction for the United States District Courts, other than the District of Columbia District Courts, to entertain mandamus actions against public officials was changed by the passage of 76 Stat. 744 in 1962.

Ashe vs. McNamara, 355 F.2d 277 (1st Cir. 1965) very ably states the now applicable law relative to the present status of the jurisdiction of mandamus actions in all of the United States District Courts against public officials as follows at Page 279:

"At the outset, it merits mention that this action is brought under section 1361 of title 28, United States Code, part of a 1962 enactment which enlarged the jurisdiction of the district courts and liberalized venue. 76 Stat. 744. That statute explicitly gives all district courts now for the first time 'original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States * * * to perform a duty owed to the plaintiff.' Moreover, an additional provision of the 1962 enactment, which is now section 1391 of title 28, creates venue for such an action at several places, among them the district in which the plaintiff resides, and in so doing expressly makes the defendant amenable to service by certified mail beyond the territorial limits of the district in which the action is brought. Thus, obstacles which until recently might have impeded this suit in any district other than the District of Columbia,[2] no longer exist."

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2. See Hart and Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1186-87; Byse, Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensible Parties, Mandamus, 1962, 75 Harv. L. Rev. 1479; and Note, Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts, 1938, 38 COL. L. REV. 903.

This Court, upon reviewing the Appendix, will ascertain, of course, that this action was filed August 25, 1967, and therefore jurisdiction and venue in a mandamus action against the Secretary of the Interior could be and was entertained in the United States District Court for the Western District of Oklahoma.

The legatees and devisees of the Indian testator further state that the equitable reason given by the Secretary of the Interior acting by and through the Regional Solicitor for the disapproval of the decedent Indians Will in this case was not a valid or legal reason for the failure to approve the Will of the decedent Indian, therefore by the arbitrary denial of the right of the Indian to make a Will and have same approved, the Secretary of the Interior was therefore subject to an Order in the nature of a mandamus to approve said Will as he was directed and ordered to so do by the Trial Court herein, pursuant to jurisdiction and venue granted by 28 U.S.C. § 1361 and 1391 and even though it should be determined that the final and conclusive clause of 25 U.S.C. 372 complements 25 U.S.C. 373 and thereby determining that an action cannot be brought under the Administrative Procedure Act for Judicial review, this Court could order the approval of the Will by the Secretary of the Interior under jurisdiction granted by 28 U.S.C. 1361 as was done and ordered by the Trial Court herein and of course, the Trial Court also held that it had jurisdiction under the Administrative Procedure Act.

CONCLUSION

Language on the Statute books in the field of Indian law, as in other fields of law, has only a tenuous relation to the law in action. The words of Court opinions in the field of Indian law also frequently have a tenuous relation to the actual holdings of the Court. The modern trend is to treat minority groups in a fair and equitable manner and the oldest and most persisting of the minority groups in the United States are the Indians. Not only is it important to realize the temporal depth of existing legislation concerning Indians and Indian tribes, but it is also important to appreciate the past existence of legislation which has technically ceased to exist. It appears to the legatees and devisees of the Indian testator that this Court may after considering the temporal depth of existing legislation determine that Judicial review can be given to the adjudication of heirship and to the approval or disapproval of Wills by the Secretary of the Interior under both 25 U.S.C. 372 and 25 U.S.C. 373 even though the final and conclusive clause appears in 25 U.S.C. 372, but if this Court should adjudicate and decide that final and conclusive is still applicable to 25 U.S.C. 372, it should hold and decide in the alternative that the Courts can give Judicial review of the actions of the Secretary of the Interior in approving or not approving Wills of Indian testators pursuant to 25 U.S.C. 373 which Statute does not contain the final and conclusive clause, and that the Trial Court had jurisdiction herein for the reasons aforestated.

President Nixon at the time of the resignation of former Chief Justice, Earl Warren, and upon the appointment of Warren E.

Burger as Chief Justice of this Court on the 23rd day of June, 1969, made the following observation concerning temporal depth:

> "'Sixteen years have passed since the Chief Justice assumed his present position. These 16 years, without doubt, will be described by historians as years of greater change in America than any in our history.
>
> 'And that brings us to think of the mystery of Government in this country, and for that matter in the world, the secret of how Government can survive for free men. And we think of the terms 'change' and 'continuity'. Change without continuity can be anarchy. Change with continuity can mean progress. And continuity without change can mean no progress.'"

and we believe this Court may see fit to make a change of its interpretation of the applicable Statutes, which we believe will mean progress herein.

For the reasons stated herein, the Judgment of the Tenth Circuit should be reversed and the Judgment of the Trial Court should be upheld and confirmed and finalized.

Respectfully submitted,

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Counsel for Petitioners

November, 1969

APPENDIX A

Tne Code of Federal Regulations that are still in full force and effect and were in full force and effect when the Will of George Chahsenah, the decedent herein, was executed and when same was offered for probate and approval can be found in Title 25 of the Code of Federal Regulations, Subchapter C-Probate Part 15 and all Sections of Part 15 that pertain to the probate and approval of Wills of Indian testators after their death and the execution of Wills during their lifetime are as follows:

§ 15.1 'Administration of estates.' The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part.

§ 15.2 'Notice of hearings.' Hearings to determine the heirs of deceased Indians or to probate their wills shall be conducted only after notice of the time and place of such hearings shall have been posted for 20 days in five or more conspicuous places on the reservation of which the decedent was a resident or, if the decedent was not a resident of a reservation, in five or more conspicuous places in the vicinity of the proposed place of hearing.

§ 15.3 'Contents of notice.' The notice shall state that the examiner of inheritance, will at the time and place specified therein, take testimony to determine the heirs of the deceased Indian (naming him) and, if a will is offered for probate, testimony as to the validity of such will. The notice shall list the presumptive heirs of the decedent, and if a will is offered for probate, the beneficiaries under such will and the attesting witnesses to the will. The notice shall cite the regulations in this part as the source of the legal authority and jurisdiction for the holding of the hearing. * * *

§ 15.12 'Wills, validity attested.' No action shall be taken on the will of a deceased Indian until testimony shall have been taken as to the testamentary capacity of the decedent to execute the will and as to the circumstances surrounding its execution. A reasonable effort shall be made to procure the testimony of the attesting witnesses to the will; or, if their testimony is not reasonably available, an effort shall be made to identify their signatures through other evidence.

§ 15.15 'Decision.' The Examiner of Inheritance shall, except as provided in § 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approv- the will of an Indian shall state the devisees and legatees who take under the will and the particular property which

each is to receive, and shall construe any ambiguous provision of the will. Every decision shall state those claims against the estate which are allowed and those claims which are disallowed. A copy of the decision shall be mailed to each person who is found by the Examiner to be entitled to share in the estate, to each person whose claim to share in the estate was considered and denied by the Examiner, and to the Superintendent.

§ 15.21 'Escheat'. When the record in any estate indicates that an Indian has died intestate without heirs, the record shall be transmitted to the Secretary for decision.

§ 15.28 'Making, approval as to form, and revocation of wills.' (a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) Where a will has been executed and filed with the superintendent during the lifetime of the testator, the will shall be forwarded by the superintendent to the examiner of inheritance, who shall pass on the form of the will and then return it to the superintendent with appropriate instructions. A will shall be held in absolute confidence, and its contents shall not be divulged prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent will or other writing executed with the same

formalities as are required in the case of destroying the will with the intention of revoking it. No will that is subject to the regulations of this part shall be deemed to be evoked by operation of the law of any State.

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

May 10, 1941

MEMORANDUM for the Assistant Secretary.

The attached letter to the Secretary, dated April 28, recommended disapproval of the will of William Smith, deceased Nez Perce Allottee No. 157 of the Northern Idaho Agency. The only reason given for disapproval of the will is that the will 'does not conform with Secretary's Order No. 420, dated August 14, 1933, prohibiting, except under certain circumstances, the alienation of Indian lands and the issuance of patent in fee.' That order forbids, with certain exceptions, the sale of restricted or Indian trust lands and the removal of restrictions from such lands by issuance of certificates of competency, patents in fee, or orders removing restrictions. It has no application to testamentary disposals of Indian property.

The record shows that the testator was of sound and disposing mind at the time of the execution of his will. No evidence whatever of fraud, duress, undue influence or other imposition is contained in the record. The testator devised certain inherited interests having a value of about $900 to Louie J. Grende, a white man. Specific devises were also made to Matilda Fleet, a Spokane Indian, and Maud Jennings, half-sister and closest living relative of the testator who is also made sole residuary

devisee and legatee. In a written statement made contemporaneously with the will, the testator was careful to explain his reasons for these dispositions. According to that statement the devise to Grende was made because Grende had provided him with a home and had taken good care of him. The devise to Matilda Fleet was made because the subject of the devise was the allotment of Matilda's father and Matilda already had an interest in it. The devise to Maud was made because he wanted her to have all of his inherited interest on the Coeur d'Alene Reservation. If the will be disapproved, all of these stated desires of the testator will be defeated. Matilda who is not a heir will take nothing. Grende, the white man, would likewise take nothing as an heir but in recognition of services rendered to him by the decedent it is proposed to allow a claim in his behalf against the estate in the amount of $600. Maud, while an heir, would have to share the land interests intended to be given her with others. Finally, five people not intended to be objects of the testator's bounty would be given a one-tenth interest each in the entire estate.

The act of June 25, 1910 (36 Stat. 856), as amended, declares that any person having restricted lands or other restricted or trust property, 'shall have the right *** to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior' with the proviso that no such will shall have any validity unless approved by the Secretary. The right to make a will is thus conferred on the Indian not on the Secretary. What-

ever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other imposition, which clearly is not present.

I recommend that the will be approved.

For the Solicitor,

/s/ W. H. Flanery,
Chief of Division.

Approved and referred to the
Commissioner of Indian Affairs: May 12, 1941

/s/ Oscar L. Chapman
Assistant Secretary.